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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA

UNITHERM FOOD SYSTEMS, INC., )  
an Illinois corporation, and )  
JENNIE-O-FOODS, INC., a )  
Minnesota corporation, )  
Plaintiffs, )

vs. ) No. CIV 01-347-C

SWIFT-ECKRICH, INC., d/b/a )  
CONAGRA REFRIGERATED FOODS, )  
a Delaware corporation, )  
Defendant. )

THIS DEPOSITION CONTAINS CONFIDENTIAL  
MATERIAL

The deposition of SYED HUSSAIN, called  
for examination, taken before GAIL LIVIGNI, a  
Notary Public within and for the County of Will,  
State of Illinois, and a Certified Shorthand  
Reporter of said state, at Suite 200, 184 Schuman  
Boulevard, Naperville, Illinois, on the 12th day of  
February, A.D., 2002, at 11:00 o'clock a.m.

CCPY -

1 A. Right.

2 Q. So you're going to sell that product to  
3 the public, correct?

4 A. With a temporary approval, <sup>?</sup>

5 Q. Okay. And let me hand you what I'll  
6 mark as 6. Can you identify that document? That's  
7 No. 6, is that correct?

8 A. Yes.

9 Q. Can you identify that for us, sir?

10 A. It's a Maillose pH and concentration  
11 check sheet that was generated on the test date and  
12 subsequent test dates.

13 Q. For days thereafter, January 3rd through  
14 January 13, correct?

15 A. Correct.

16 Q. Products being produced with the  
17 Maillose, correct?

18 A. Correct.

19 Q. With that system at the Wells plant,  
20 correct?

21 A. Correct.

22 Q. And that product with the UPC codes is  
23 being sold to the public, correct?   

24 A. I don't know if that was sold to the

1 public.

2 Q. Well, you had labeling?

3 A. This is a label request.

4 Q. Okay.

5 A. This is a request.

6 Q. Correct. And you only have a label  
7 request if you're going to sell it to the public,  
8 correct?

9 A. But then there is other people that get  
10 involved from marketing and sales who decide  
11 whether the product goes in the market and all  
12 that, so I am not involved in that process. My job  
13 stops here.

14 Q. But it's produced for commercial use,  
15 correct, with the labeling change?

16 A. If it is going for production.

17 Q. Yes.

18 A. My job stops here when I've done the  
19 testing and I said go ahead and make the change and  
20 ask others to approve it, I'm done with it.

21 Q. Okay. You intended to produce that  
22 product on a commercial basis. That's why you  
23 asked for the temporary label change, correct?

24 A. Just me?

1 A. Correct.

2 Q. Why did you stop using Maillose?

3 A. As I recall, the Maillose when we were  
4 heating in this caramel dip was emitting some kind  
5 of gas that was objectionable to the people on the  
6 line. That's my recollection.

7 Q. Were you achieving a golden brown color  
8 with that Maillose?

9 A. We were achieving a golden brown color.

10 Q. It was just a matter of the people on  
11 the line --

12 A. Were complaining that it had an odor.

13 Q. Okay. And, in fact, the next one, item  
14 3, says products affected by UPC and it lists  
15 those. Are those UPC codes consistent with the  
16 skinless slice and serve oven prepared caramel?

17 A. Counsel, you're holding it. I'm not  
18 seeing it. You said another document.

19 Q. The same one, Exhibit 7, right there.  
20 Take a look at that. I apologize.

21 A. No problem.

22 Q. Look at number 3?

23 A. Number 3.

24 Q. What are those UPC codes, what do those

1 MR. SCHROEDER: Objection, misleading. Go  
2 ahead.

3 BY THE WITNESS:

4 A. This is a document that was generated  
5 not in my presence and not addressed to me, and so  
6 I don't know. Anybody can write anything on it.

7 BY MR. CASTRO:

8 Q. Well, do you disagree with it?

9 A. Disagree with what part?

10 Q. With the contents of this document. Do  
11 you disagree with what it says?

12 A. It's data.

13 Q. It's a document that has product,  
14 turkey, uncooked turkey breast, correct?

15 A. Right, not a problem.

16 Q. Supplied by Armour?

17 A. Correct.

18 Q. Was that product supplied by you?

19 A. Correct.

20 Q. And that was on September 30th, 1993?

21 A. Correct.

22 Q. Do you agree with that date?

23 A. That is correct.

24 Q. Do you agree that you had what appear to

1 be one raw breast, a second is a raw breast, and  
2 the third is a cooked breast? Do you agree with  
3 those?

4 A. Exactly.

5 Q. Do you agree with everything contained  
6 in the first column?

7 A. Correct.

8 Q. How about the second column where it  
9 says cook time? You have 90 minutes, 90 minutes,  
10 right? Is that what that says?

11 A. Where?

12 Q. Does that say 90?

13 A. Okay, 90 minutes.

14 Q. So you were there for at least an hour  
15 and a half, right?

16 A. I was not there for the entire cook.

17 Q. How did that happen?

18 A. Well, as I said --

19 Q. Is that the old My Cousin Vinnie, does  
20 it cook faster --

21 A. *(This was not by me, but somebody else)*  
~~These data were~~ generated -- if it was  
22 my writing, I could say yes, this is my handwriting  
23 and this is my data. This data was generated by  
24 somebody.

1 Q. Right.

2 A. And it could have been generated  
3 afterwards.

4 Q. Well, did they cook it in front of you?

5 A. They put the product in front of me.

6 Q. Right.

7 A. The clearance, as I remember, was so  
8 small, the product got stuck also, okay. So if it  
9 was finished in 90 minutes, I was only there -- as  
10 I recall, my recollection is 30 minutes, 40  
11 minutes. That's all I was there.

12 Q. But if someone else recalls you were  
13 there longer, you wouldn't have any reason to  
14 disagree with them, would you?

15 A. If they have a better memory than me,  
16 yes.

17 Q. Who else was there other than John Shoop  
18 and you? Was David Howard there?

19 A. My recollection I don't recall him being  
20 there.

21 Q. Was Prem Singh there?

22 A. No.

23 Q. Did you tell Prem Singh you were going  
24 to run some tests on this whole muscle meat?

1 Q. Right. And he's wanting to sell you the  
2 process?

3 A. They all want to sell something.

4 Q. I understand. My questions are very  
5 simple. He just wants to sell you a process that  
6 will produce a golden brown product, correct?

7 A. That's your words.

8 Q. I am asking you if you agree with those  
9 words?

10 A. No, I do not agree with those words.  
11 This is a proposal submitted for my consideration  
12 for this equipment.

13 Q. Right.

14 A. That's all it means to me, simple  
15 proposal.

16 Q. Equipment to produce what?

17 A. A smoked product, a color smooth  
18 product.

19 Q. Not necessarily smoked. Brownd?

20 A. Brownd? <sup>?</sup>

21 Q. Using Maillose, correct?

22 A. Where does it say Maillose? I don't  
23 know.

24 Q. Well, let's go to the next page.



1 A. That is true.

2 Q. And then they also had a proposal and a  
3 price quote for the oven, correct?

4 A. That is correct.

5 Q. Those two items could produce a golden  
6 brown product, correct?

7 A. I didn't say that.

8 Q. You saw the golden brown product  
9 produced in 1993 during the testing?

10 A. At Unitherm?

11 Q. Yes.

12 A. I don't know if I characterized it as a  
13 golden brown color. I don't recall saying that I  
14 characterized it as a golden brown color.

15 Q. Was that a golden brown color?

16 A. It's a brown color.

17 Q. That must be a term of art akin to  
18 patent law.

19 MR. SCHROEDER: Golden brown?

20 BY MR. CASTRO:

21 Q. In fact, you mixed caramel and Maillose,  
22 didn't you? Here is a memo, No. 19: That's a  
23 December 29, 1993 memo from you to others including  
24 Prem Singh regarding a trip report at Wells plant,

1 MR. SCHROEDER: You think or --

2 MR. CASTRO: No, I pass the witness.

3 EXAMINATION

4 BY MR. SCHROEDER:

5 Q. Okay, just a few quick questions. With  
6 reference to Exhibit 1, which is the Prem Singh  
7 patent, you notice that starting with column five  
8 of this patent, we have a series of examples, and  
9 as to each example, the patent identifies a color  
10 in terms of LAB values. Do you see that?

11 A. Right.

12 Q. Are you able to translate those LAB  
13 values mentally into colors?

14 A. No, I cannot.

15 Q. Are you able to make a comparison, based  
16 on this patent, without having equipment available  
17 to you, between colors identified in this patent  
18 and the colors that you would choose when you were  
19 using Maillose?

20 A. I cannot.

21 Q. Do you know whether you ever achieved a  
22 golden brown color in the sense in which that term  
23 golden brown is used in the context of this patent?

24 A. No, I don't know.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1)	UNITHERM FOOD SYSTEMS, INC., )		
	an Illinois corporation; AND )		
(2)	JENNIE-O FOODS, INC., )		
	a Minnesota corporation, )		
	Plaintiffs, )		
	v. )		
			Case No. CIV-01-347-C
(1)	SWIFT-ECKRICH, INC. d/b/a )		JURY TRIAL DEMANDED
	CONAGRA REFRIGERATED )		
	FOODS, a Delaware corporation, )		
	Defendant. )		

**FIRST AMENDED COMPLAINT**

Plaintiffs, Unitherm Food Systems, Inc. ("Unitherm") and Jennie-O Foods, Inc. ("Jennie-O") (collectively referred to as "Plaintiffs") for their complaint against Defendant Swift-Eckrich, Inc. d/b/a Conagra Refrigerated Foods ("Conagra") allege as follows:

**PARTIES**

1. Plaintiff, Unitherm, is an Illinois corporation authorized to do business in the State of Oklahoma. Unitherm's principal place of business is at 1108 West Hartford Avenue, Ponca City, Oklahoma 74601.

2. Plaintiff, Jennie-O, is a Minnesota corporation authorized to do business in the State of Oklahoma with its principal place of business in Willmar, Minnesota.

**EXHIBIT H**

**PTO-003208**

3. Upon information and belief, Conagra is a Delaware corporation with its principal place of business in Downers Grove, Illinois. Conagra is doing business in the State of Oklahoma, with its registered service agent listed at 115 Southwest 89th, Oklahoma City, Oklahoma 73139.

#### **JURISDICTION AND VENUE**

4. This action arises under the patent laws of the United States, 35 U.S.C. § 100, *et seq.*, The Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, the Lanham Act, 15 U.S.C. § 1051, *et seq.*, the Oklahoma Deceptive Trade Practices Act, 78 O.S. § 51 *et seq.*, the Oklahoma Antitrust Reform Act, 79 O.S. § 201 *et seq.*, the Oklahoma Uniform Trade Secrets Act, 78 O.S. § 86 *et seq.*, and the common law of the United States and the State of Oklahoma.

5. This action is, in part, for correction of inventorship under 35 U.S.C. § 256 and for patent infringement. Therefore, this Court has jurisdiction under the patent and trademark laws of the United States pursuant to 28 U.S.C. § 1338(a).

6. This Court has federal question jurisdiction over the change of inventorship, patent infringement, Sherman Antitrust Act, Lanham Act, and declaratory judgment claims asserted herein as such claims arise under the patent, trademark, and antitrust laws of the United States pursuant to 28 U.S.C. §§ 1331, 1332 and 1338(a). This Court has jurisdiction over Plaintiffs' claim of unfair competition pursuant to 28 U.S.C. § 1338(b) because that claim is joined with a substantial and related claim under the patent and trademark laws. Further, this Court has jurisdiction over all

pendent state law claims pursuant to 28 U.S.C. § 1367 because such claims are so related to claims in this action within this Court's original jurisdiction that they form part of the same case or controversy.

7. This Court has diversity jurisdiction over all the claims as the matters in controversy exceed \$75,000.00 and the Plaintiffs and Defendant are of diverse citizenship pursuant to 28 U.S.C. § 1332.

8. Jurisdiction over Conagra is conferred upon this Court by Fed. R. Civ. P. 4(e), in conjunction with Oklahoma's "long-arm" statute, 12 O.S. § 2004(f) by virtue of Conagra's commission of acts and omissions, or causing the commission of acts and omissions within this State and judicial district and/or committing or causing to be committed acts and omissions which effects have been felt, and were intended to be felt, within this State and judicial district.

9. Venue is proper pursuant to 28 U.S.C. § 1391(b)(c) and 28 U.S.C. §§ 1400(a) and (b) in that Conagra has a regular and established place of business within this judicial district, Conagra may be found within this judicial district, and Conagra has committed acts of infringement, misappropriation of trade secrets, and other wrongful conduct within this judicial district.

### **BACKGROUND FACTS**

10. On September 14, 1999, the United States Patent and Trademark Office issued United States Patent No. 5,952,027 to Prem S. Singh ("Singh") for "Method For Browning

Precooked, Whole Muscle Meat Products" (the "'027 Patent"). The '027 Patent issued from United States Patent Application Serial No. 09/075,608, filed May 11, 1998 and was assigned to Conagra.

11. Prior to the end of September of 1993, Mr. David Howard, President of Unitherm, had conceived and Unitherm had successfully reduced to practice all of the subject matter now claimed by Conagra in the '027 Patent. The Unitherm process is referred to hereinafter as the Unitherm in-line browning/smoking process.

12. The Unitherm in-line browning/smoking process and the system developed by Unitherm for practicing the process were and are breakthrough innovations which are now widely and extensively used for producing browned and/or smoked deli meats, turkey breasts, hams and other products sold in supermarkets and used in restaurants, cafeterias and elsewhere. The innovative Unitherm process can increase product yields by as much as 8% or more while also providing increased production rates, improved product safety, and reduced cost. Moreover, the Unitherm process provides excellent product quality, appearance, taste, consistency and texture. The value of the Unitherm process is further reflected by the fact that Conagra is demanding its competitors pay a royalty of 10¢ per pound of product for a non-exclusive license under the '027 Patent. Each separate process line sold by Unitherm typically produces between 6,000-10,000 pounds of product per hour.

13. Unitherm's reduction to practice of the Unitherm in-line browning/ smoking process prior to the end of September 1993 involved browning the surfaces of precooked, whole

muscle meat products such as precooked turkey breasts, precooked whole turkeys, and precooked hams; and included:

- (a) Coating the precooked meat products by dipping and/or spraying with liquid smoke, browning agents such as Maillose supplied to Unitherm by Red Arrow Products Company, Inc. ("Red Arrow"), broth, and/or other browning or flavoring agents to provide a thin film of the selected agent(s) on the surfaces of the product;
- (b) Exposing the coated, precooked products to heat energy in a Unitherm RAPIDFLOW circulating air oven for residence times ranging from 4 minutes to 12 minutes and at temperatures ranging from 250°C to 350°C;
- (c) Varying the oven temperatures and residence times to obtain generally any type of golden brown color desired;
- (d) Achieving shrinkage levels in the precooked products of as little as 1% by weight;
- (e) Browning precooked products having beginning product core temperatures of as little as 4°C;
- (f) Core temperature increases of as little as less than 1°C; and
- (g) Pre-drying the product prior to coating.

14. Subsequent to such reduction to practice, Unitherm provided confidential demonstrations of the Unitherm browning/smoking process on September 30, 1993, at Unitherm's facilities at Elk Grove, Illinois, for Prem Singh and Syed Hussain, Senior Project Manager for Conagra. The demonstration involved applying Maillose browning agent to the surface of a fully cooked turkey breast and then conveying the breast through a Unitherm RAPIDFLOW circulating

air oven at 280°C-300°C for 7 minutes. Data sheets recording the demonstration state that the color was "excellent."

15. In a thank you note sent by Mr. Hussain to David and Amanda Howard the following day, October 1, 1993, Mr. Hussain stated that: "It was a very good learning experience for me. The tests we ran were very good. I will be presenting the test products to our management this afternoon."

16. In a confidential October 1993 memorandum for distribution to Conagra only, Unitherm's sales agent/representative, Jim Hutchison, summarized Unitherm's demonstrations to Conagra thus far concerning turkey breast browning using Maillose as having achieved outstanding color and texture and yields of from 98 to 99% at residence times in the range of from 7.5 to 10 minutes.

17. In Unitherm's ongoing efforts to sell the Unitherm browning/smoking process and system therefor to Conagra, Unitherm gave additional live, confidential demonstrations of the process to Conagra in October of 1993. Attending the demonstrations for Conagra were Singh, and Syed Hussain.

18. The additional confidential sales demonstrations of the Unitherm process provided to Conagra in October of 1993 involved precooked turkey breasts having initial internal temperatures of as little as 27°F which were dipped in Maillose and/or liquid smoke and cooked in



a Unitherm RAPIDFLOW oven for 7.5 minutes at temperatures ranging from 280° to 330°C. Product yields of as much as 98.7% and internal temperature increases of as little as 1°F were shown.

19. Because of the successful and impressive results shown by Unitherm in its previous demonstrations, Syed Hussain and Prem Singh began working with Unitherm to schedule a private confidential browning/smoking seminar to be conducted by Unitherm for Conagra in late December of 1993 or January of 1994 at Downers Grove, Illinois. Unitherm arranged for John Shoop, Andy Konopacki, and Ron Ratz of Red Arrow to attend the seminar and provide Maillose and liquid smoke samples for demonstrations of the Unitherm browning process.

20. The confidential seminar was conducted for certain of Conagra's research, development, and marketing personnel on January 25, 1994. Those in attendance included Prem Singh. The seminar included successful demonstrations of the Unitherm browning/smoking process for browning precooked turkey breasts supplied by Conagra. The browning agents used were the Maillose and liquid smoke compositions supplied by Red Arrow.

21. In September of 1993, prior to Unitherm's confidential September 30, 1993 demonstration to Singh and Syed Hussain, Unitherm informed Thorn Apple Valley, Inc. ("Thorn Apple"), a competitor of Conagra, that Unitherm had successfully developed a browning/smoking process wherein turkey breasts are browned in less than 14 minutes. At this time, the Senior Vice President of Operations of Thorn Apple was Mr. Arnie Mickelberg.

22. In October of 1993, Thorn Apple sent some precooked hams to Unitherm for browning demonstrations. For these demonstrations, Unitherm dipped the hams by hand in Maillose and other browning agents and then heated the hams in the Unitherm RAPIDFLOW oven for 7.5 minutes. Unitherm then returned the browned samples to Thorn Apple along with a similarly browned turkey loaf.

23. In July of 1995, Unitherm again successfully demonstrated its innovative browning process to Thorn Apple at the request of Arnie Mickelberg. As a result of the browning demonstration, Thorn Apple ordered a Unitherm browning/smoking system, including a RAPIDFLOW oven and a liquid smoke /browning fluid atomizer. The equipment was ordered in or about July of 1995 and was delivered in or about August of 1995.

24. Later in 1995, Arnie Mickelberg was hired by Conagra as its President. At Mr. Mickelberg's request, David Howard, in October of 1995, submitted a list of recommendations to Conagra for improving Conagra's products and profitability. Included in these recommendations was the Unitherm in-line browning/smoking process and system.

25. In October of 1995, Unitherm, at Mr. Mickelberg's request, again gave a confidential presentation of its browning/smoking process to Conagra personnel at Conagra's facility in Downers Grove, Illinois. Those attending included Arnie Mickelberg and Ted Berry, Vice President of Conagra.

26. Unitherm agreed to supply a Unitherm two-zone RAPIDFLOW oven to Conagra for a period of two weeks and to further share Unitherm's confidential know how for its innovative browning and smoking process so that Conagra, purportedly, could conduct trials to determine whether the color of the smoked and/or browned products produced by the Unitherm process would match or improve the color of Conagra's existing products produced by other methods. The specific criteria for the trials, as set forth by Unitherm in an October 16, 1995 letter to Prem Singh of Conagra included, among other things: liquid smoke application for turkey breasts with an oven dwell time of 7.5 minutes at 330°C, an internal core temperature rise of 1°C, and a product shrinkage of only 1%.

27. In the context of these discussions, Conagra asked Unitherm to provide its innovative process exclusively to Conagra. Specifically, Conagra desired for Unitherm to discontinue all sales and confidential disclosures of the Unitherm process to Conagra's competitors. In a letter dated October 9, 1995, Unitherm offered Conagra an exclusive license for the Unitherm process for a payment to Unitherm of 50% of Conagra's resulting "return on investment" (*i.e.*, 50% of Conagra's increased profit resulting from improved yields, reduced costs, increased throughput, etc.)

28. In November of 1995, Unitherm shipped a RAPIDFLOW oven to Conagra for what was intended to be a two week trial. Conagra did not return the RAPIDFLOW oven to Unitherm until May of 1996, six months later. Between November 1995 and May 1996, Conagra

conducted numerous tests of the Unitherm browning/smoking process using the Unitherm RAPIDFLOW oven.

29. During the midst of these "trials", in January of 1996, Prem Singh traveled to Unitherm's facility in Ponca City, Oklahoma to again view demonstrations of the Unitherm browning and smoking process.

30. During and after Conagra's six month "trial" of the Unitherm process and oven, Prem Singh and J.B. Weatherspoon, Vice President of Research and Development of Conagra, reported to Unitherm on numerous occasions that Conagra was very pleased with the Unitherm process and product and that the results were excellent with respect to all relevant parameters, including product color, product quality, product shrinkage, and product consistency. Prem Singh and J.B. Weatherspoon also reported that the product scored extremely well in sensory tests conducted by Conagra.

31. In July of 1996, J.B. Weatherspoon of Conagra informed Unitherm that the issuance of a purchase order by Conagra for a Unitherm system was imminent.

32. In April of 1997, Unitherm again attempted to persuade Conagra to act on its expressed intent and repeated promises to purchase the Unitherm system. Mr. Howard reminded Conagra's new president, Dennis DesLauriers, that Unitherm had already demonstrated that the

Unitherm process could save Conagra a minimum of \$15,000 per day. Unitherm also reminded Mr. DesLauriers that at least four of Conagra's competitors had already purchased the Unitherm system.

33. However, despite the obvious success of the previous demonstrations conducted by Unitherm for Conagra, the new president of Conagra, Dennis DesLauriers, now told Unitherm that the browning/smoking process would not work.

34. On February 24, 1998, Conagra again visited Unitherm's facility to view and inspect the innovative in-line smoking/browning process developed by Unitherm. Those present for Conagra were Prem Singh and Chris Salm, Vice President of Conagra's research and development department. Unitherm once again disclosed confidential and proprietary information to Conagra with the understanding that such information belonged to Unitherm.

35. Prior to the Unitherm presentation on February 24, 1998, Prem Singh and Chris Salm signed confidentiality agreements from Unitherm.

36. Immediately after the confidential February 24, 1998 demonstration and prior to leaving the Unitherm facility in Ponca City, Chris Salm and Prem Singh requested Unitherm provide another proposal and quote for the Unitherm process and system. Unitherm handed the proposal to Salm and Singh as they departed. The quote included a two-zone RAPIDFLOW oven and a liquid smoke/browning fluid applicator. Pursuant to new confidential information provided

by Unitherm to Conagra at the February 24, 1998 demonstration, the quote also included a unique new infrared system for performing the purge removal and predrying steps of the Unitherm process.

37. In April of 1998, upon request from Conagra's research and development department, Unitherm provided to Conagra confidential know-how for its browning/smoking process and system. By way of example, this included but was not limited to operating and other parameters for Unitherm's bag stripper, infrared purge removal, smoke applicator, RAPIDFLOW oven and mechanical impingement chiller.

38. Unknown to Howard and Unitherm, and without any permission, authorization, approval, or consent, Conagra filed on May 11, 1998 in the United States Patent Trademark office the application for the '027 Patent disclosing in detail confidential information misappropriated from Unitherm, and claiming Unitherm's innovative and confidential browning/smoking process.

39. More than one year prior to the filing of the application for the '027 Patent (i.e., prior to the May 11, 1997 "critical date" of the '027 Patent) Unitherm also received sales orders and/or purchase orders for the Unitherm browning system from several of Conagra's competitors. The Unitherm browning systems ordered and purchased included RAPIDFLOW ovens having liquid smoke application systems upstream of the ovens for applying liquid smoke, Mailllose, and/or other browning agents. Some of the browning systems ordered also included: purge removal and drying

systems; bag strippers for removing the precooked product from individual bags; and/or impingement chillers.

40. At least some of the Unitherm in-line browning/smoking systems were delivered prior to May 11, 1997. Of these systems, more than one included a purge removal and drying system. Moreover, some of the browning/smoking systems sold by Unitherm were in commercial use prior to the May 11, 1997 critical date of the '027 Patent and were producing browned product in accordance with the Unitherm in-line browning/smoking process. Such product first appeared on the market at least as early as 1996.

41. Prior to the May 11, 1997 critical date of the '027 Patent, Unitherm and/or its sales representatives/agents provided confidential sales demonstrations of the Unitherm browning/smoking process to Thorn Apple as discussed above and to a number of Conagra's other competitors. These demonstrations utilized the Unitherm RAPIDFLOW oven and involved: (a) residence times in the range of from 4.5 to 15 minutes (typically about 7.5 minutes); (b) oven temperatures of from 270 to 350°C; (c) yield losses of as little as 1% or less in some cases; and (d) internal temperature increases of as little as 1°F. The demonstrations typically involved precooked turkey breasts having agents such as Maillöse or liquid smoke applied thereto.

42. Prior to the May 11, 1997 critical date of the '027 Patent, Unitherm and/or its sales representatives also sent sales materials, proposals, correspondence, etc., to Conagra and a number of Conagra's competitors promoting the Unitherm browning/smoking process. These

materials mentioned the browning of turkey breasts or other products using liquid smoke, Maillose, and/or other browning agents. The parameters discussed included: residence times of from three to ten minutes in the Unitherm RAPIDFLOW oven; example temperatures of from 280 to 330°C; shrinkage losses of as little as 1%; and internal temperature increases of 1°C or less.

43. At the time they filed their application for the '027 Patent, Conagra and Singh knew that, beginning well prior to the May 11, 1997 critical date of the '027 Patent, the Unitherm browning/smoking process and system, embodying all of the subject matter called for in the claims of the '027 Patent, had been and was being demonstrated to, offered for sale to, ordered by, and purchased by Conagra's competitors.

44. In his Declaration submitted to the U.S. Patent Office in the application for the '027 Patent, Singh swore that:

I believe I am the original, first, and sole inventor . . . of the subject matter which is claimed and for which a utility patent is sought in the invention entitled

IMPROVED METHOD FOR BROWNING PRECOOKED, WHOLE  
MUSCLE MEAT PRODUCTS

the application of which . . . was filed May 11, 1998, Application  
Serial No. 09/075,608.

45. Singh also declared that: "I acknowledge the duty to disclose to the Office all information known to me to be material to patentability as defined in Title 37, Code of Federal Regulations, Sec. 1.56."



46. Neither Singh, Conagra, nor any of their attorneys or agents ever disclosed the Unitherm browning/smoking process, or any facts relevant thereto, to the U.S. Patent Office. Moreover, neither Singh, Conagra, nor any of their attorneys or agents ever disclosed to the U.S. Patent Office that Howard is the inventor of the subject matter disclosed and claimed in the '027 Patent.

47. Unitherm has continued to promote and offer for sale its browning process and system, which continue to embody the subject matter of the claims of the '027 Patent.

48. Up to the issuance of the '027 Patent, in September of 1999, Unitherm's yearly sales were \$1,678,000 in 1993, \$3,139,000 in 1994, \$3,112,000 in 1995, \$2,677,000 in 1996, \$3,121,000 in 1997, \$3,328,000 in 1998, and \$3,757,000 in 1999. Following the issuance of the '027 Patent and notification to Unitherm's customers, Unitherm's yearly sales were \$3,200,000 (estimate).

49. On June 1, 1998 in a final attempt to sell the browning/smoking process to Conagra, Unitherm, without knowing of the '027 Patent application, sent a letter to Roy Cantu of Conagra urging Conagra to reconsider its refusal to purchase the process and informed Conagra that Unitherm had incurred significant time and expense ("some \$40,000 worth of time and expense proving the above project") in attempting to sell the process to Conagra.

50. On or about April 1998, Unitherm began to suspect that Conagra, without Unitherm's authorization, permission, approval, or consent, was disclosing or intended to disclose Unitherm's confidential browning/smoking process and system to Unitherm's competitors to obtain bids against Unitherm.

51. In a letter to Conagra's attorneys dated August 3, 1998, Howard informed Conagra of Unitherm's suspicion that Conagra had disclosed the proprietary details of the Unitherm browning/smoking process and system to Unitherm's competitors.

52. On August 17, 1998, without informing Unitherm of the patent application filed by Conagra, Conagra's attorneys acknowledged to Unitherm that Conagra was aware of its obligations to keep Unitherm's proprietary information confidential and wrote "consequently, [Conagra] was very surprised by your suggestion that it has improperly used your trade secret information and cannot imagine the basis for your allegations."

53. On August 20, 1998, Unitherm again reminded Conagra that Unitherm had introduced an innovative in-line smoking and browning process to Conagra and if Conagra used any of the proprietary process or equipment technology learned at Unitherm it would, *inter alia*, be in breach of its confidentiality agreement with Unitherm. Unitherm concluded by stating "would you accept that [Conagra] should not pursue in-line smoking in the format of the process introduced to [Conagra] by Unitherm?" Conagra did not respond, nor did it disclose to Unitherm that it was pursuing a patent on the smoking/browning process invented by Unitherm.

54. Throughout 1998 and 1999 Conagra failed to disclose to Unitherm that it had filed a patent application on Unitherm's process.

55. On September 14, 1999 the United States Patent and Trademark office issued the '027 Patent which Conagra now claims to own.

56. On March 21, 2000 Conagra began informing Unitherm's customers, including Plaintiff Jennie-O, that it had been issued the '027 Patent and advised Unitherm customers that "we intend to aggressively protect all of our rights under this ['027] Patent."

57. On July 8, 2000 Conagra informed Unitherm's customers that they would be required to pay a royalty of 10¢ per pound of product in order to obtain a nonexclusive license under the '027 Patent.

58. As a result of the fraudulently filed '027 Patent and the conduct of Conagra to protect its purported rights, Unitherm has lost significant business and has been forced to lay off 50% of its employees.

59. The true inventor and the true owner of the '027 Patent, David Howard, and Unitherm have assigned to Jennie-O an equal joint ownership with Unitherm of the entire right, title and interest in and to the '027 Patent and to all previous claims for infringement arising thereunder.

60. Howard and Unitherm have also assigned to Jennie-O an equal joint interest with Unitherm of certain other claims that are assignable by law.

### **CAUSES OF ACTION**

#### **CAUSE I — CHANGE OF INVENTORSHIP**

**35 U.S.C. § 256**

61. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

62. Howard is the sole inventor of all of the subject matter claimed in the '027 Patent. Howard alone conceived the solution to the problem (*i.e.*, the means to the desired end) which constitutes all of the subject matter claimed in the '027 Patent. Singh and Conagra in no way contributed to the conception of any of the subject matter claimed in the '027 Patent.

63. Through error, Singh was named as the inventor of the '027 Patent.

64. Through error, Howard was not named as the inventor of the '027 Patent.

65. Such error arose without any deceptive intention on the part of Howard, Unitherm, or Jennie-O.

WHEREFORE, Plaintiffs respectfully request that the Court enter a judgment in their favor pursuant to Title 35 U.S.C. § 256 declaring that Howard is the inventor of the '027 Patent. Plaintiffs further request the Court order correction of the '027 Patent to remove Singh as the inventor and name Howard as the sole inventor thereof and that the Court order the U.S. Patent Office and the Commissioner of Patents to issue a certificate accordingly. In the alternative, Plaintiffs pray that the '027 Patent be declared invalid, void and/or unenforceable. Plaintiffs further request an award of attorney fees and costs.

### **CAUSE II — DECLARATORY JUDGMENT**

66. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

67. This is an action brought pursuant to 28 U.S.C. § 2201 for declaratory judgment of invalidity of the '027 Patent.

68. Upon information and belief, the '027 Patent is invalid, unenforceable and void because it was issued contrary to law including under 35 U.S.C. §§ 102 and 103 and under the rules and regulations of the U.S. Patent and Trademark Office.

69. If the Court were to conclude in this matter that Singh is a co-inventor of the subject matter claimed in the '027 Patent, the '027 Patent would also be unenforceable under the Doctrine of Inequitable conduct and/or Unclean Hands.

70. The subject matter claimed in the '027 Patent was on sale and in public use in this country more than one year prior to the date of the application for patent in the United States.

71. The sales, offers for sale, and public use were of the process claimed in the '027 Patent and for a device and system embodying the claimed process.

72. The invention was ready for patenting at the time of such commercial on-sale and public use activities. Unitherm had reduced the subject matter to practice and had demonstrated and disclosed the patented process to others.

73. Prior to the critical date of the '027 Patent, Unitherm had made actual sales, entered into purchase orders and agreements, and had made deliveries of the Unitherm browning/smoking system and process.

74. As to all such on-sale, public use and other activities prior to the May 11, 1997 critical date involving the subject matter of the '027 Patent claims, neither Unitherm nor its customers were under any limitation, restriction, or obligation of secrecy to Conagra or Singh.

75. Since well prior to filing their application for the '027 Patent, Conagra and Singh have been fully aware that, prior to the May 11, 1997 critical date of the '027 Patent, Unitherm was offering for sale and selling the Unitherm in-line browning/smoking process claimed in the '027 Patent to Conagra and Conagra's competitors.

76. Some purchasers of the Unitherm process were using the process commercially and selling products produced therefrom prior to the critical date of the '027 Patent.

77. Upon information and belief, Conagra knew that its competitors were selling products produced from the claimed process prior to the critical date of the '027 Patent.

78. Conagra and Singh have actively, knowingly, intentionally, and maliciously made, and continue to make, material misrepresentations to the United States Patent Office, to Plaintiffs, to Conagra's competitors, and to Plaintiffs' customers as to the inventorship and ownership of the '027 Patent. Conagra and Singh have also knowingly and intentionally withheld material evidence of the on-sale and public use activities of Unitherm and Unitherm's customers. As a result of such material misrepresentations, Conagra has falsely obtained issuance of the '027 Patent in the name of Singh and has otherwise damaged, and continues to damage, Plaintiffs.

79. Based upon correspondence received by Plaintiffs and others, and upon Conagra's false claims of inventorship and ownership, Plaintiffs have a reasonable apprehension of being sued by Conagra for infringement of the '027 Patent. Conagra's actions are harming and threatening to harm Plaintiffs, thereby creating a case in controversy and necessitating judicial resolution by way of a declaratory judgment of invalidity and/or unenforceability of the '027 Patent, together with other appropriate legal and equitable relief.

WHEREFORE, Plaintiffs respectfully request that the Court enter a judgment in their favor declaring the '027 Patent to be invalid, unenforceable and void and declaring that this is an exceptional case entitling Plaintiffs to an award of costs, attorneys' fees, and such other and further relief as the Court deems appropriate.

### **CAUSE III — PATENT INFRINGEMENT**

80. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

81. Pursuant to the change of inventorship under 35 U.S.C. § 256, Howard has completely replaced Singh as the inventor of the '027 Patent such that neither Singh nor Conagra have or have ever had any rights under the '027 Patent.

82. Conagra and Singh acted with deceptive intent in obtaining the '027 Patent in the name of Singh.

83. Plaintiffs, as the true owners of the '027 Patent, have the right to sue for infringement thereof, to seek to prevent further infringement and to collect any and all damages and other relief for infringement.

84. Upon information and belief, Conagra has heretofore and continues to engage in one or more acts of using and/or selling and offering to sell products produced from



the process claimed in the '027 Patent, which activity infringes the '027 Patent, in this District and elsewhere in the United States. Unless enjoined by the Court, this infringing activity of Conagra will continue. Such products sold and/or offered for sale by Conagra are believed to include, but are not limited to, Butterball browned turkey breast, Butterball smoked turkey breast, and Butterball honey roasted smoked turkey breast.

85. Upon information and belief, without authorization, permission, or license, Conagra has and continues to contribute to the infringement of the '027 Patent and to induce others to infringe the '027 Patent.

86. Upon information and belief, the infringement of the '027 Patent by Conagra has been willful such that Plaintiffs' damages should be trebled. In addition, Conagra's conduct renders this an exceptional case under 35 U.S.C. § 285, thus entitling Plaintiffs to an award of attorney fees.

87. As a result of Conagra's infringement, inducing infringement and contributing to the infringement of the '027 Patent, Plaintiffs have suffered, and continue to suffer, damages in an amount to be determined at trial.

**CAUSE IV — VIOLATION OF LANHAM ACT § 43(a), 15 U.S.C. § 1125(a)**

88. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

89. Plaintiffs have invested and are currently investing considerable monies, time, and effort in creating, promoting, demonstrating, and selling the Unitherm browning/smoking process which has now been disclosed in detail (including at least some of Unitherm's proprietary know-how pertaining thereto) and falsely claimed by Conagra in the '027 Patent.

90. In connection with its products, services, and other commercial activities related to the browning/smoking process at issue, Conagra knowingly, intentionally, and willfully has falsely stated and represented, and continues to falsely state and represent, in commerce, that Singh is the inventor of the process and that Conagra is entitled to and has exclusive ownership rights in the process.

91. Conagra's false and misleading statements, representations, and activities constitute false designations of origin, false and misleading descriptions of fact, and false and misleading representations of fact which are likely to cause confusion, mistake, and deception at least as to (a) the affiliation, connection, or association of Conagra with Unitherm and (b) the origin, sponsorship, and approval of Conagra's goods, services, and commercial activities by Unitherm. Conagra's false and misleading statements, representations, and activities are thus in violation of § 43(a) of the Lanham Act (15 U.S.C. § 1125(a)).

92. By reason of Conagra's wrongful acts and unfair competition, Plaintiffs have been damaged and will continue to suffer damage to their business, reputation, and good will, as well as lost sales and profits Plaintiffs would have made but for Conagra's wrongful acts and unfair competition.

93. Upon information and belief, Conagra's unlawful acts will continue. These acts of Conagra have caused, and will continue to cause irreparable injury to Plaintiffs.

94. Plaintiffs are entitled to recover from Conagra the damages they have sustained and will sustain, any gains, profits, and advantages obtained by Conagra, and the costs of this action. Plaintiffs further respectfully submit that, under the circumstances of the case, Plaintiffs' actual damages resulting from Conagra's wrongful acts should be trebled.

95. Plaintiffs further aver that this is an exceptional case entitling Plaintiffs to an award of reasonable attorneys fees pursuant to 15 U.S.C. § 1117.

**CAUSE V — THE OKLAHOMA DECEPTIVE TRADE PRACTICES ACT**  
**78 O.S. § 52 et seq.**

96. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

97. The facts stated herein further establish that Conagra has and continues to violate the Oklahoma Deceptive Trade Practices Act, 78 O.S. § 52 et seq. at least by:

- (a) knowingly and willfully making false representations as to the source, sponsorship, approval, or certification of the respective goods, services, and commercial activities of Conagra, Unitherm, and Jennie-O;
- (b) knowingly and willfully making false representations as to affiliation, connection, association with, or certification by another;
- (c) knowingly and willfully making false representations as to the sponsorship, approval, status, affiliation, and/or connection of others with the respective goods, services, and commercial activities of Conagra, Unitherm, and Jennie-O; and
- (a) knowingly and willfully disparaging the goods, services, and businesses of Unitherm and Jennie-O by false and misleading misrepresentations of fact as to the inventorship, origin, and ownership of the browning/smoking process at issue.

98. Conagra has willfully engaged in the above trade practices knowing them to be false, deceptive, and misleading.

99. Conagra has intended to injure and has injured Plaintiffs and Conagra's other competitors, and has intended to destroy and substantially lessen, and has destroyed and substantially lessened, competition.

100. By reason of Defendants acts, Plaintiffs have been damaged and will continue to suffer damage to their business, reputation, and good will, as well as lost sales and profits Plaintiffs would have had and would continue to have but for Defendants acts.

101. These wrongful acts have caused and will continue to cause Plaintiffs substantial injury, including loss of customers, dilution of their good will, confusion of existing and potential customers, injury to their reputation, and diminution of the value of their products and services. The harm these wrongful acts will cause to Plaintiffs is both imminent and irreparable. Plaintiffs have no adequate remedy at law. Plaintiffs are entitled to an injunction restraining Conagra from engaging in further such unlawful conduct.

102. Under the facts and circumstances of this case, Plaintiffs are entitled to an award of attorney fees pursuant to 78 O.S. § 54(b).

#### **CAUSE VI — COMMON LAW UNFAIR COMPETITION**

103. Plaintiffs re-allege and incorporate by reference herein each and every preceding allegation.

104. The acts of Conagra alleged above constitute unfair competition and a violation of the common law of the State of Oklahoma in that:

- (a) Conagra's acts enable them to obtain the benefit of and trade on the ideas and invention of Plaintiffs;

- (b) Conagra's acts damage Plaintiff's business and good will in that Plaintiffs' have no control over their business or activities; and
- (c) Conagra's acts are likely to cause confusion, mistake or deception.

105. As a result of Conagra's conduct, they have received and continue to receive substantial financial benefit from an invention and process owned by Plaintiffs for which in equity and good conscience Plaintiffs should be compensated.

106. As a result of Conagra's conduct, they have saved and continue to save substantial monies for at least the development, refinement, use, and/or licensing of Plaintiffs' innovative process, for which in equity and good conscience Plaintiffs should be compensated.

107. The above alleged acts have resulted and are resulting in the unjust enrichment of Conagra and damage to Plaintiffs as alleged herein.

**CAUSE VII — VIOLATION OF THE OKLAHOMA UNIFORM TRADE SECRETS ACT**  
**78 O.S. § 86 *et seq.***  
**(By Plaintiff Unitherm)**

108. Unitherm re-alleges and incorporates by reference herein each and every preceding allegation.

109. Unitherm's proprietary information and know-how concerning its in-line browning/smoking process and system therefore now being used and/or disclosed and claimed by Conagra in the '027 Patent, had and has both actual and potential independent economic value from not being generally known to, and not readily ascertainable by proper means by, other persons.

110. Such proprietary information and know-how was the subject of efforts by Unitherm that were reasonable under the circumstances to maintain the secrecy thereof. Such efforts included the use of confidentiality agreements, confidentiality notices, in-house confidential memorandum, and the like.

111. Unitherm expended a great deal of money, effort, time, and resources in developing its proprietary information and know-how.

112. The value of such information and know-how for refining and optimizing the Unitherm process and fully duplicating the results achieved by Unitherm is evidenced by the need for Singh and Conagra to repeatedly request and view demonstrations by Unitherm over several years and at great expense to Unitherm.

113. As a result of Conagra's conduct, Unitherm has been and will continue to be deprived of the benefits of selling and/or licensing its know-how, systems, equipment, and services.

114. Such proprietary information and know-how provided by Unitherm to Conagra was confidential and was acquired by Conagra under circumstances (e.g., confidentiality agreements, confidential memos, etc.), giving rise to a duty on the part of Conagra to maintain the secrecy of the information and know-how and narrowly limiting the permissible uses thereof.

115. Despite its duty to maintain the secrecy of Unitherm's proprietary information, Conagra knowingly, willfully, and maliciously misappropriated Unitherm's trade secrets by, among other things: acquiring Unitherm's information and know-how through an ongoing course of improper, fraudulent conduct; using the information to wrongfully obtain, and disclosing the information to the public in, the '027 Patent; and using the information and know-how for making and operating browning systems and making and selling browned product, all without the permission, authorization, or approval of Unitherm and without paying any compensation therefor to Unitherm.

116. Unitherm has been and continues to be injured by Conagra's misappropriation of Unitherm's trade secrets and is entitled to recover either damages or a reasonable royalty for the misappropriation and is also entitled to recover the unjust enrichment obtained by Conagra as a result of the misappropriation.

117. Because Conagra's conduct was willful and malicious, Unitherm is also entitled to an award of exemplary damages in an amount not exceeding twice the actual damages or royalty awarded and is also entitled to an award of reasonable attorneys' fees.



**CAUSE VIII— TORTIOUS INTERFERENCE WITH  
EXISTING CONTRACTUAL AND BUSINESS RELATIONS  
(By Plaintiff Unitherm)**

118. Plaintiff, Unitherm, re-alleges and incorporates by reference herein each and every preceding allegation.

119. Conagra by its malicious and wrongful conduct has interfered and continues to interfere with Unitherm's existing business relationships with its suppliers and vendors. Such acts and interference have been and continue to be in violation of Oklahoma law.

120. Conagra knew or under the circumstances should have known of Unitherm's existing contractual relationships.

121. As a result of Conagra's conduct, Unitherm lost existing sales to its customers.

122. Conagra's wrongful and malicious acts and interference have damaged and continue to damage Plaintiff Unitherm in an amount to be determined at trial. Unitherm is also entitled to injunctive relief.

123. Conagra's wrongful acts of interference have also been and continue to be malicious and without justification, privilege or excuse and warrant an award of punitive damages to Unitherm.

**CAUSE IX — INTENTIONAL INTERFERENCE  
WITH PROSPECTIVE ECONOMIC RELATIONSHIPS  
(By Plaintiff Unitherm)**

124. Plaintiff, Unitherm, re-alleges and incorporates by reference herein each and every preceding allegation.

125. Unitherm had numerous business relationships with its customers and vendors with the probability of future economic benefit for Unitherm.

126. Conagra, at the time it sent its notice and demand for licenses to Unitherm's customers and other parties and committed other wrongful acts, knew or should have known of the business relationships which Unitherm had with these customers or vendors and the probable future benefit to Unitherm.

127. Except for the conduct by Conagra, Unitherm was reasonably certain to have entered into a contract with one or more of those customers for future sales of the smoking and browning process, equipment related thereto and other products and services provided by Unitherm.

128. Conagra's conduct was intentional and malicious and was not justified, privileged nor excusable.

129. As a result of Conagra's conduct, Plaintiff Unitherm has been damaged in an amount to be determined at trial.

**CAUSE X — ACTUAL OR CONSTRUCTIVE FRAUD**  
**(By Plaintiff Unitherm)**

130. Plaintiff Unitherm re-alleges and incorporates by reference herein each and every preceding allegation.

131. Conagra is guilty of numerous fraudulent nondisclosures and fraudulent misrepresentations to the USPTO, to Unitherm and to Unitherm's customers.

132. By these nondisclosures, misrepresentations and other fraudulent activities Conagra: wrongfully obtained the '027 Patent in the name of Singh; saved substantial expense, time and resources, and obtained other benefits, all to the detriment of Unitherm, by fraudulently and repeatedly inducing Unitherm to assist Conagra in implementing and using the Unitherm process; has fraudulently claimed and continues to fraudulently claim ownership of and exclusive rights in the Unitherm process; and has otherwise damaged Unitherm.

133. In addition to deceiving the Patent Office and other acts constituting fraud, Conagra and Singh had a duty to disclose to Unitherm that they intended to and had in fact filed a patent application on Unitherm's invention.

134. Singh and Conagra fraudulently, maliciously and willfully betrayed the trust, confidence and confidentiality of Unitherm, exploited its work, and thwarted its intent.

135. By Conagra's fraudulent and manipulative conduct, and without any authorization, approval or knowledge of Unitherm, Conagra and Singh illegally obtained the right to exclude, through its federal patent rights, Unitherm and Conagra's competitors from making, using, selling, importing or otherwise benefitting from Unitherm's work, all of which are in contravention of Unitherm's rights.

136. The retention of such benefits by Conagra, as well as any fruits thereof, would be inequitable and unjust and should be disgorged by Conagra.

137. Conagra and Singh were aware that the '027 Patent had significant economic value as a deterrent to competitors and have in fact used the '027 Patent in an effort to deter competitors by demanding a royalty of 10¢ per pound for use of the process.

138. At all times pertinent hereto Conagra and Singh acted in bad faith in all their dealings with Unitherm.

139. Conagra also willfully and maliciously represented to Unitherm that they were interested in purchasing the process on an exclusive basis intending that Unitherm rely on such representations to Unitherm's detriment.

140. All Such conduct by Conagra constitutes false representations of material facts willfully made to Unitherm for the purpose and having the effect of inducing Unitherm rely thereon to Conagra's benefit and Unitherm's detriment.

141. Conagra's conduct was a conscious and deliberate misappropriation of Unitherm's proprietary information and know-how which entitles Unitherm to restitution requiring Conagra to disgorge all profits, gains and savings flowing from the use of Unitherm's proprietary information and know-how.

142. Unitherm is further entitled to an accounting from Conagra of all gains, profits and savings recognized by Conagra as a result of the '027 Patent.

143. As a proximate result of Conagra's fraud, Plaintiff Unitherm has been damaged in an amount to be determined at trial. Because such conduct was willful and malicious, Plaintiffs are also entitled to punitive damages.

**CAUSE XI — VIOLATION OF THE SHERMAN ANTITRUST ACT**  
**15 U.S.C. § 1 et seq.**

144. Plaintiffs reallege and incorporate by reference herein each and every preceding allegation.

145. Conagra knowingly and willfully obtained the issuance and grant of the '027 Patent by intentional, material fraud.

146. Such fraud included knowingly, willfully, and falsely swearing before the U.S. Patent and Trademark Office that Singh was the inventor of the subject matter claimed in the '027 Patent.

147. Such fraud also included knowingly and willfully withholding knowledge by Conagra of prior public uses and prior sales and offers for sale of the process claimed in the '027 Patent, and of products produced therefrom, in the United States more than one year prior to the date of the application for the '027 Patent.

148. These deliberate false statements and omissions were of facts clearly material to patentability and were intended to and did mislead and deceive the patent examiner and the U.S. Patent Office into granting the '027 Patent to Singh and Conagra. Such facts, concealed and/or misrepresented by Conagra, constitute a complete bar to patentability under at least 35 U.S.C. §§ 102 and 103 so that the subject matter claimed in the '027 Patent was not patentable. Thus, the patent examiner and the U.S. Patent Office would not have granted the '027 Patent had Conagra not made these intentional, material misrepresentations and omissions.

149. The process fraudulently patented by Conagra dominates the market for sliceable cooked turkey products sold in interstate commerce throughout the entire United States. Upon information and belief, over 80% of all sliceable cooked turkey products sold in the United States to supermarkets, delis, and food services are produced by the process fraudulently claimed by Conagra in the '027 patent.

150. In addition to the exclusionary power of the fraudulently obtained '027 Patent, and upon information and belief, Conagra is one of the five largest producers and suppliers in this market.

151. Conagra has notified and threatened its competitors throughout this market that it will "aggressively" enforce its fraudulently obtained '027 Patent.

152. Conagra has thus engaged and is engaging in predatory, anti-competitive conduct with the intent to control the market for sliceable, cooked turkey products throughout the United States, to greatly lessen and destroy competition, and to attempt to monopolize said market. Unless enjoined by this court, there is a dangerous probability that Conagra will be successful in achieving such control and monopoly power.

153. By reason of Conagra's willful, intentional, and continuing acts and efforts to control and to lessen and destroy competition in the relevant market and to monopolize same, Plaintiffs have been damaged in an amount to be shown by the evidence presented at trial.

**CAUSE XII — VIOLATION OF THE OKLAHOMA ANTITRUST REFORM ACT**  
**79 O.S. § 201 *et. seq.***

154. Plaintiffs re-allege and incorporated by reference herein each and every preceding allegation.

155. These same intentional and willful actions and attempts by Conagra to control, monopolize and restrain trade and commerce in the relevant market have also occurred and are occurring within the State of Oklahoma and therefore also constitute violations of at least 79 O.S. § 203 A & B.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment as follows:

**CAUSE I**

That the Court find that David Howard is the true inventor of the '027 Patent and that Plaintiffs are therefore entitled to a change of inventorship and that the Court order the U.S. Patent Office and the Commissioner of Patents to issue a certificate accordingly.

Plaintiffs' costs, reasonable attorneys' fees and such other relief as the Court deems proper.



## **CAUSE II**

In the alternative that the Court find that the '027 Patent is invalid and/or unenforceable.

Plaintiffs' costs, reasonable attorneys' fees and such other relief as the Court deems proper.

## **CAUSE III**

That the Court enter a permanent injunction for the life of the '027 Patent against continued infringement of the '027 Patent by Conagra and its officers, agents, servants, employees, attorneys and those controlling, controlled by or in active concert or participation with it pursuant to 35 U.S.C. § 283.

A. An accounting of all gains, profits and advantages derived by Conagra from its infringement, contributory infringement, and/or inducing infringement of the '027 Patent and the recovery of Plaintiffs' lost profits as provided for under 35 U.S.C. § 289;

B. Compensatory damages, interest and the costs of suit pursuant to 35 U.S.C. § 284;

C. Increased damages of treble the amount of actual damages found or assessed pursuant to 35 U.S.C. § 284;

D. Reasonable attorney fees pursuant to 35 U.S.C. § 285; and

F. Such other and further relief as the Court deems proper.

**FOR CAUSES IV THROUGH VI**

A. A permanent injunction against all continued false and/or misleading statements, representations, or activities as to the inventorship, origin, ownership, sponsorship and approval of the browning/smoking process at issue;

B. An accounting of all gains, profits, and advantages derived by Conagra from Conagra's acts of unfair competition;

C. Compensatory damages, interest and the costs of suit;

D. Enhanced damages of treble the amount of actual damages; and

E. Reasonable attorney fees and such other further relief as the Court deems proper.

## **CAUSE VII**

- A. Compensatory damages including both actual losses suffered by Unitherm and the unjust enrichment obtained by Conagra as a result of its misappropriation **OR** a reasonable royalty in lieu of such damages;
- B. An injunction pursuant to 78 O.S. § 86 against Conagra, its directors, officers, agents, servants, employees, and all other persons in concert or in privity or in participation with Conagra from using, disclosing, or otherwise misappropriating Unitherm's trade secret information and know-how;
- C. Exemplary damages in an amount of two times the actual damages or reasonable royalty determined; and
- D. Reasonable attorneys' fees and such other further relief as the Court deems proper.

## **CAUSES VIII-X**

- A. A permanent injunction against Conagra, its directors, officers, agents, servants, employees, and all other persons acting in concert or in privity or in participation with Conagra from interfering with Unitherm's business relations, and from fraudulently misrepresenting the inventorship and ownership of the subject matter of the '027 Patent;

B. That judgment be entered for Plaintiff Unitherm and against Conagra for Unitherm's damages attributable to Conagra's intentional, wrongful and malicious interference with Unitherm's business relations and fraud and for punitive damages;

C. An accounting and disgorgement of all gains, profits, and advantages derived by Conagra from its fraudulent and wrongful conduct;

D. That Unitherm have judgment against Conagra for Plaintiffs' costs and reasonable attorney fees; and

E. That the Court grant such other and further relief as the Court deems proper.

#### **CAUSES XI and XII**

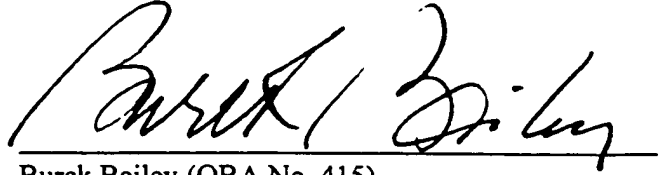
A. That the Court adjudge and decree that the defendant Conagra's actions and conduct were and are an unlawful restraint of interstate trade and commerce and an attempt to monopolize the relevant market in violation of the Sherman Act and the Oklahoma Antitrust Reform Act; and

B. Treble the damages determined to have been sustained by Plaintiffs; and

C. Reasonable attorney fees and the costs of this suit; and

D. That Conagra be enjoined from continuing such unlawful actions and conduct in restraint of trade and commerce; and

E. Such other and further relief as the Court deems proper.



Burck Bailey (OBA No. 415)  
Greg A. Castro (OBA No. 11787)  
Fellers, Snider, Blankenship, Bailey & Tippens  
100 North Broadway, Suite 1700  
Oklahoma City, Oklahoma 73102-8820  
Telephone: (405) 232-0621  
Facsimile: (405) 232-9659

**JURY TRIAL DEMANDED**

-and-

Dennis D. Brown (OBA No. 13662)  
Fellers, Snider, Blankenship, Bailey & Tippens  
321 South Boston, Suite 800  
Tulsa, OK 74103-3318  
Telephone: (918) 599-0621  
Facsimile: (918) 583-9659

Attorneys for Plaintiffs, Unitherm Food Systems, Inc.  
and Jennie-O Foods, Inc.

98775.1

**CERTIFICATE OF MAILING**

I hereby certify on this 29 day of May, 2001, a true and correct copy of the above and foregoing "First Amended Complaint" was mailed, postage prepaid, to the following attorneys for Defendant:

Robert D. Tomlinson, Esq.  
McKinney & Stringer  
101 North Robinson Ave., Suite 1300  
Oklahoma City, OK 73102-5504

Attorneys for Defendant

  
Burck Bailey

98775.1